IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAN NATIONAL INSURANCE COMPANY; AMERICAN NATIONAL INVESTMENT ACCOUNTS, INC.; SM&R INVESTMENTS, INC.; AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY; STANDARD LIFE AND ACCIDENT INSURANCE COMPANY; FARM FAMILY LIFE INSURANCE COMPANY; FARM FAMILY CASUALTY INSURANCE COMPANY; and NATIONAL WESTERN LIFE INSURANCE COMPANY **Plaintiffs**		
v.	§	~~CIVIL ACTION NO. G-02-0084~~ CONSOLIDATED WITH H-01-3624
ARTHUR ANDERSEN, L.L.P., D. STEPHEN GODDARD, JR. ;DAVID DUNCAN; KENNETH L. LAY; JEFFREY K. SKILLING, ANDREW S. FASTOW, RICHARD A. CAUSEY; RICHARD B. BUY; MICHAEL J. KOPPER; ROBERT K. JAEDICKE; RONNIE C. CHAN; JOE C. FOY; JOHN WAKEMAN; WENDY L. GRAMM; BRUCE G. WILSON; JOHN MENDELSON; PAULO V. FERRAZ PEREIRA; ROBERT A. BELFER; NORMAN P. BLAKE, JR.; JOHN H. DUNCAN; CHARLES A. LEMAISTRE; FRANK SAVAGE; HERBERT S. WINOKUR, JR.; KEN L. HARRISON; REBECCA MARK-JUSBASCHE; JEROME J. MEYER; JOHN A. URQUHART; and CHARLES E. WALKER **Defendants**		

PLAINTIFFS' SUPPLEMENT TO REMAND MOTION

416

PLAINTIFFS' SUPPLEMENT TO REMAND MOTION

Plaintiffs, American National Insurance Company, et al. ("American National"), files this Supplement to Remand Motion to advise the Court of a recent decision from the United States District Court for the Western District of Texas which is pertinent to American National's pending Motion to Remand.

Attached as Exhibit A is the Order of Remand from *Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, A-02-CA-070-H, in the Western District of Texas. The theory of federal subject matter jurisdiction asserted by Arthur Andersen in *Bullock* is identical to one asserted by Defendant Andersen in response to American National's Motion to Remand. In *Bullock*, the district court considered, analyzed and rejected Defendant Andersen's assertion that the federal district court may disregard the well-pleaded complaint rule. The court rejected Andersen's argument that the court could create its own SLUSA "covered class action" by consolidating removed state law actions in federal court which, as state court actions, did not qualify as "covered class actions" under SLUSA.

The factual allegations, the legal theories, and procedural posture of *Bullock* are, in essence, the same as those faced by this Court in determining whether to remand American National's action against Defendants. American National, therefore, respectfully requests that the Court consider the *Bullock* remand decision and prays that the Court remand American National's action to the 56th Judicial District Court of Galveston County, Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on counsel for each party as listed on the attached service list on 26 March, 2002.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JANE BULLOCK, JOHN BARNHILL, DON REILAND, SCOTT BORCHART, MICHAEL MIES, VIRGINIA ACOSTA, JIM HEVELY, MIKE BAUBY, ROBERT MORAN, JACK & MARILYN TURNER, and HAL MOORMAN & MILTON TATE, CO-TRUSTEES FOR MOORMAN, TATE, MOORMAN & URQUHART MONEY PURCHASE PLAN AND TRUST,	§	
Plaintiffs,	§	
v.	§	NO. A-02-CA-070-H
ARTHUR ANDERSEN, L.L.P., D. STEPHEN GODDARD, JR., DAVID B. DUNCAN, DEBRA A. CASH ROGER WILLARD, THOMAS H. BAUER ANDREW S. FASTOW, KENNETH L. LAY, AND JEFFREY J. SKILLING,	§	Reference Washington Co: 32,716
Defendants.	§	

ORDER OF REMAND

Factual and Procedural History

On this day came on to be considered the above-styled and numbered cause which derives from the recent collapse of the Houston-based Enron Corporation. The Plaintiffs are citizens of the state of Texas and owners of Enron stock. They bring claims for fraud, negligence, and civil conspiracy against three of Enron's directors and/or officers, Enron's independent auditor, Arthur Andersen, L.L.P. ("Andersen"), and several partners at Andersen's Houston office.

This case was originally filed in the 21st Judicial District Court of Washington County, Texas, on January 24, 2002. Six days later, Defendant Andersen filed a notice of removal explaining that jurisdiction lies with this Court based on (1) the

8

Securities Litigation Uniform Standards Act ("SLUSA") of 1998, and (2) allegations of federal securities law violations within the complaint. In their motion to remand, the Plaintiffs counter that SLUSA does not apply because they do not fit its definition of a "covered class" and that mere allegations will not give rise to federal question jurisdiction. After carefully considering Defendant Andersen's notice of removal, the Plaintiffs' motion to remand and Defendant Andersen's response thereto, the Court is of the opinion that this case should be remanded to state court for lack of subject matter jurisdiction.

Discussion

In its first argument, Defendant Andersen argues that Congress has expressly preempted state law class actions alleging fraud in connection with the purchase or sale of covered securities. SLUSA, it says, requires that this case be removed from state court. As such, the Court will begin its analysis with a brief examination of the influences and motivations behind SLUSA and its statutory precursors.

Responding to the reluctance of investors to reenter the securities markets following the 1929 crash of the stock market, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934. **See** 15 U.S.C. § 77a et seq. (1933 Act); 15 U.S.C. § 78a et seq. (1934 Act); **see also Ernst & Ernst v. Hochfelder**, 425 U.S. 185, 194-95 (1976) (detailing the purposes and influences of the Acts). The aim of the 1933 Act, as the Supreme Court has explained, was "to provide investors with full

disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing." **Id.** at 195; **see** 15 U.S.C. § 78b (Necessity for regulation); H.R. Rep. No. 73-85 (1st Sess. 1933). The 1934 Act, on the other hand, imposed reporting requirements on companies whose stock was listed on national securities exchanges and was further designed to ward against manipulation of stock prices through regulation of the securities exchanges and over-the-counter markets. **See** 15 U.S.C. § 78b; **Ernst & Ernst**, 425 U.S. at 195. In the wake of the 1933 and 1934 Acts, various states also enacted laws which similarly aimed to protect investors from fraud in connection with the sale of securities. **See Gutierrez v. Deloitte & Touche, L.L.P.**, 147 F.Supp.2d 584, 588 (W.D. Tex. 2001).

Although the 1933 and 1934 Acts were intended to protect investors from corporate insiders, Congress has more recently become concerned with protecting corporations from the claims and causes of overly litigious investors. **Id.** at 588-89. The Private Securities Litigation Reform Act ("PSLRA") of 1995 was enacted as a result. **Id.** at 589. At the time, it was thought that PSLRA's heightened pleading requirements would make it more difficult for investors to bring securities fraud class actions against corporate issuers. Yet the subsequent decline in filings of securities fraud class actions in federal courts was roughly equivalent to the increased number of filings in state courts.

See H.R. Conf. Rep. No. 105-803 (1998); **see also Lander v. Hartford Life & Annuity Ins. Co.**, 251 F.3d 101, 108 (2d Cir. 2001). Accordingly, SLUSA was signed into law in 1998. Congress hoped that SLUSA would finally set uniform standards for the filing of class actions based on fraud against companies issuing certain covered securities by dictating that such actions be governed exclusively by federal law. **See Lander**, 251 F.3d at 108; **see also** 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2). SLUSA does not preempt all state actions against the issuers of securities, however. **See Gutierrez**, 147 F.Supp.2d at 590; 2 Thomas Lee Hazen, Securities Regulation § 12.15 (4th ed. 2002) ("[T]he Uniform Standards Act applies only to class actions and thus not to individual or derivative suits."). It provides unique definitions of "covered class" and "covered securities," for example, and will not apply to actions whose terms land them outside those definitions. **See** 15 U.S.C. §§ 77p(f) and 78bb(f); **see also** Pub. L. No. 105-353, § 2, 112 Stat. 3227 ("[I]t is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.")

In order to establish the claim in this case as falling within SLUSA's preemptive scope, the Defendants must demonstrate that (1) the action is a "covered class action," (2) the action is based on state law, (3) they are alleged to have

misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and (4) their misrepresentation or omission of that material fact (or their use or employment of a manipulative or deceptive device or contrivance) came "in connection with" the purchase or sale of a "covered security." **See** 15 U.S.C. §§ 77p(b)-(c) and 78bb(f)(1)-(2); **see also Green v. Ameritrade, Inc.**, 2002 WL 126170, at *4 (8th Cir. Feb. 1, 2002). The Plaintiffs have based the present case on state law, and they contend that the Defendants made "untrue and deceptive statements of material fact" and "omitted to state material facts" which induced them "to purchase and/or retain Enron common stock at artificially inflated prices." The only question to be resolved then is whether the case is a class action by SLUSA's definition. The Court finds that it is not.

SLUSA defines a "covered class action" as:

> (i) any single lawsuit in which--
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--
>
> (I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. §§ 77p(f)(2)(A) and 78bb(f)(5)(B). The Plaintiffs do not seek damages on a representative basis or on behalf of fifty or more persons. And while a number of lawsuits involving common questions of law or fact have been filed, these suits have not been joined or consolidated, and they do not proceed as a single action. The Court disagrees with Defendant Andersen's assertion that the act of consolidating similar cases would be an "empty formality" and that because various cases could be consolidated, they should be viewed as having been consolidated. The issue before the Court is whether this case is removable, not whether it might be consolidated with other cases.

Nor is the Court persuaded by Defendant Andersen's objection that plaintiffs' counsel "[ha]s s[ought] to avoid the creation of a 'covered class action'" by bringing a number of separate lawsuits arising from identical alleged facts and making identical claims. The Court reminds the Defendants that the Plaintiffs are the masters of their complaint. **See Louisville & Nashville R.R., v. Mottley**, 211 U.S. 149, 153 (1908). It notes too that the courts must "presume that a legislature says in a statute what it means and means in a statute what it says[.]" **Connecticut Nat'l Bank v. Germain**, 503 U.S. 249, 253-54 (1992). Where a "statute's language is plain, the sole function of the courts is to enforce it according to its terms." **United States v. Ron Pair Enters., Inc.**, 489 U.S. 235, 241 (1989) (quoting **Caminetti v. United States**, 242 U.S. 470, 485 (1917)). Moreover,

"removal statutes are to be strictly construed against removal." **Getty Oil Corp. v. Ins. Co. of N. Am.**, 841 F.2d 1254, 1263 n.13 (5th Cir. 1988). Thus, the Court will decline the Defendants' invitation to count persons in separate lawsuits in different courts as members of a "covered class" in order that SLUSA's 50-person requirement be satisfied.

The Defendants request alternatively that the case be removed because the Plaintiffs allege in the complaint that several of the Defendants engaged in insider trading. In other words, they suggest that the case is removable because the Plaintiffs refer to federal crimes in their factual allegations. This claim fails as well, however, because plaintiffs alleging facts sufficient to invoke either federal or state jurisdiction may limit their claim so that it is based solely on state law. **See Oklahoma Tax Comm'n v. Graham**, 489 U.S. 838, 839-41 (1989). As the Fifth Circuit Court of Appeals recognized long ago, "[a] question of federal law is often lurking in the background of every case. In order to invoke the jurisdiction of a federal court there must be a substantial claim founded directly upon federal law." **Johnston v. Byrd**, 354 F.2d 982, 984 (5th Cir. 1965) (internal quotation marks omitted).

Finally, even if the case were to meet SLUSA's requirements or were to appear to be otherwise removable, the Court would still be obliged to remand it to state court. All defendants who are properly joined and served must join in the notice of removal within thirty days of the date on which they receive notice that

the case is removable. **See** 28 U.S.C. 1446(b); **Jernigan v. Ashland Oil Inc.**, 989 F.2d 812, 815 (5th Cir. 1993). None of Defendant Andersen's Co-Defendants have filed written consent that the case be removed. As the case was originally filed in state court on January 24, 2002 and as Defendant Andersen's Co-Defendants received notice of the fact on January 30 at the very latest, the time period to join in the removal has now expired.

It is therefore ORDERED that the above cause be, and it is hereby, REMANDED to the 21st District Court of Washington County, Texas. The District Clerk is directed to transmit the file to the District Clerk of Washington County, Texas.

SIGNED AND ENTERED this 5th day of March, 2002.

HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE